

82-1428

Office-Supreme Court, U.S.
FILED

FEB 25 1983

No. 82-_____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

DAIRYMEN, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, JAMES C. MILLER, III,

DAVID A. CLANTON, PATRICIA P. BAILEY,

MICHAEL PERTSCHUK AND GEORGE W. DOUGLAS,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

D. PAUL ALAGIA, JR.

JOSEPH M. DAY

BARNETT & ALAGIA

444 South Fifth Street

Louisville, Kentucky 40202

(502) 585-4131

RICHARD A. GLADSTONE

MORTON HOLLANDER*

BARNETT & ALAGIA

1000 Thomas Jefferson Street, N.W.

Washington, D.C. 20007

(202) 342-0342

Counsel for Dairymen, Inc.

**Counsel of Record*

QUESTION PRESENTED

Whether postponing judicial review of the legality of an ongoing administrative agency prosecution is improper where the postponement irretrievably destroys a statutory and constitutional right to be free from the administrative prosecution.¹

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties other than former FTC Commissioners Paul Rand Dixon and Robert Pitofsky. They have been separately served with a copy of this Petition. See footnote 3, *infra*, p. 10 and Certificate of Service, *infra*, pp. 20-21.

¹ If this petition is granted, our brief on the merits will also address the following three subsumed questions:

1. Whether the respondent Federal Trade Commission, in instituting the challenged administrative prosecution, impermissibly intruded on antitrust jurisdiction vested by Congress in the Department of Agriculture.

2. Whether the Commission's use of Treasury funds for the administrative prosecution of an agricultural cooperative violated the express statutory restriction imposed on the Commission by Section 20(a) of the 1980 Act. See *infra*, p. 2.

3. Whether, if the preceding question is answered in the affirmative, the respondents also violated (a) the Anti-Deficiency Act, 31 U.S.C. §§ 628 and 665(a); (b) the "due process" clause of the fifth amendment; and (c) the constitutional prohibition, in article I, section 9, against withdrawal of Treasury funds for unauthorized and impermissible purposes. See *infra*, p. 2.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE PETITION	11
1. The basic congressional purpose, in enacting Section 20(a) of the 1980 Act, was to shield agricultural cooperatives against the "vast" and "punishing" costs of defending oppressive and disruptive FTC proceedings challenging conduct immunized from antitrust liability by the Capper-Volstead Act ...	12
2. Where, as here, postponement of judicial review until conclusion of the FTC proceeding would nullify the congressional purpose underlying the 1980 Act, access to judicial review must be provided at the outset of the FTC proceeding	15
3. The refusal of the court below to afford timely relief is in direct conflict with the settled course of decisions by this Court	16
CONCLUSION	19
CERTIFICATE OF SERVICE	20
APPENDIX A	
1. Opinion Of The United States Court Of Appeals For The Sixth Circuit, July 30, 1982	1a
2. Judgment Of The United States Court Of Appeals For The Sixth Circuit, July 30, 1982	7a
3. Order Of The United States Court Of Appeals For The Sixth Circuit, Denying Rehearing, September 30, 1982	9a

Table of Contents Continued

Page

APPENDIX B

1. Opinion Of The United States District Court For The Western District Of Kentucky, February 2, 1981 (Judge Ballantine)	10a
2. Order Of The United States District Court For The Western District of Kentucky, February 2, 1981 (Judge Ballantine)	15a
3. Memorandum Of The United States District Court For The Western District Of Kentucky, March 31, 1981 (Judge Ballantine)	16a
4. Amended Order Of The United States District Court For The Western District Of Kentucky, March 31, 1981 (Judge Ballantine)	17a
5. Memorandum Opinion Of The United States District Court For The Western District Of Kentucky, August 5, 1981 (Judge Allen)	19a
6. Judgment Of The United States District Court For The Western District Of Kentucky, August 5, 1981 (Judge Allen)	22a

TABLE OF AUTHORITIES

CASES:	Page
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	17, 18
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	17, 18
<i>Dairymen, Inc. v. Federal Trade Commission</i> , 684 F.2d 376 (1982)	1
<i>Federal Trade Commission v. Dean Foods Co.</i> , 384 U.S. 597 (1966)	12
<i>Forgay v. Conrad</i> , 47 U.S. (6 How.) 201 (1848)	17
<i>Gardner v. Toilet Goods Ass'n.</i> , 387 U.S. 167 (1967)	18
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958)	18, 19
<i>United States v. Munsingwear</i> , 340 U.S. 36 (1950)	11
CONSTITUTION, STATUTES AND RULES OF COURT:	
U.S. CONST. art. I, § 9, cl. 7	i, 2
U.S. CONST. amend. V	i, 2
Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (1976)	7
15 U.S.C. § 17	6, 8, 9
15 U.S.C. § 18	6, 8, 9
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	17
31 U.S.C. § 628	i
31 U.S.C. § 665(a)	i
7 U.S.C.A. § 291	3
7 U.S.C.A. § 292	4
Federal Trade Commission Improvements Act, Pub.L. No. 96-252, §§ 20 and 20(a), 94 Stat. 393, 15 U.S.C.A. § 57(C) (note) (1980)	<i>passim</i>
Supreme Ct. Rule 40.3	10
Fed. R. Civ. P. 25(d)	10

Table of Authorities Continued

	Page
LEGISLATIVE MATERIALS:	
125 CONG. REC. H11190 (1979)	12, 13
125 CONG. REC. H11192 (1979)	14
125 CONG. REC. H11201 (1979)	15
126 CONG. REC. S5680 (1980)	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-____

DAIRYMEN, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, JAMES C. MILLER, III,

DAVID A. CLANTON, PATRICIA P. BAILEY,

MICHAEL PERTSCHUK AND GEORGE W. DOUGLAS,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

The petitioner, Dairymen, Inc. (Dairymen) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 684 F.2d 376. The judgments and opinions of the District Court for the Western District of Kentucky (App. B, *infra*, 10a-22a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1982. (App. A, *infra*, 7a). On September 30, 1982

the Court of Appeals denied petitioner's timely petition for rehearing. (App. A, *infra*, 9a). On December 16, 1982, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 27, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, section 9, clause 7 of the United States Constitution provides in pertinent part:

"No Money Shall Be drawn from the Treasury,
but in Consequence of Appropriations made by
Law"

2. The fifth amendment to the Constitution provides in pertinent part:

"No person shall be . . . deprived of life, liberty,
or property, without due process of law"

3. Section 20 of the Federal Trade Commission Improvements Act of 1980, Act of May 28, 1980, Pub.L. 96-252, 94 Stat. 393, 15 U.S.C.A. § 57(c)(note), entitled "Restriction of [Federal Trade] Commission Authority Relative to Agricultural Cooperatives", provides:

15 U.S.C.A. § 57c (note). Restriction of Commission authority relating to agricultural cooperatives

(a) The Federal Trade Commission shall not have any authority to use any funds which are authorized to be appropriated to carry out the Federal Trade Commission Act (15 U.S.C. 41 et seq.) for fiscal year 1980, 1981, or 1982, under section 24 of such Act, as amended by section 17 and as so redesignated in section 13, for the purpose of conducting any study, investigation, or prosecution of any agricultural cooperative

for any conduct which, because of the provisions of the Act entitled "An Act to authorize association of producers of agricultural products", approved February 18, 1922 (7 U.S.C. 291 et seq.), commonly known as the Capper-Volstead Act, is not a violation of any Federal antitrust act or the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(b) The Federal Trade Commission shall not have any authority to use any funds which are authorized to be appropriated to carry out the Federal Trade Commission Act (15 U.S.C. 41 et seq.) for fiscal year 1980, 1981, or 1982, under section 24 of such Act, as amended by section 17 and as so redesignated in section 13, for the purpose of conducting any study or investigation of any agricultural marketing orders.

4. The Capper-Volstead Act, 7 U.S.C.A. § 291 and 7 U.S.C.A. § 292, provide:

7 U.S.C.A. § 291. Authorization of associations; powers

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

7 U.S.C.A. § 292. Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or re-

strains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent

thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

5. Section 6 of the Clayton Act provides in pertinent part:

15 U.S.C. § 17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

6. Section 7 of the Clayton Act provides in pertinent part:

15 U.S.C.A. § 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be sub-

stantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

7. Section 10(c) of the Administrative Procedure Act provides:

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

STATEMENT OF THE CASE

This litigation arises out of the administrative prosecution of Dairymen by the FTC in violation of the 1980 Act's

express statutory prohibition against antitrust prosecution of Capper-Volstead agricultural cooperatives. See *supra*, pp. 2-3.

Dairymen is an agricultural cooperative association qualified under the Capper-Volstead Act (7 U.S.C. §§ 291, 292, *supra*, pp. 3-6) and Section 6 of the Clayton Act (15 U.S.C. § 17, *supra*, p. 6). Dairymen, owned and directed by its dairy farmer members, markets its members' milk and processes dairy products. Dairymen also owns several plants which process milk produced by its members.

On September 1, 1978, Dairymen acquired Farmbest Foods, Inc. (Farmbest), then a subsidiary of Munford, Inc. Farmbest was a milk processor in some areas of the southeastern United States.

1. *The FTC Proceeding Against Dairymen.* In September 1978, the FTC instituted an antitrust investigation of the acquisition of Farmbest by Dairymen.

On July 31, 1980, after almost two years of investigation and the production by Dairymen of over 50,000 documents, the FTC issued a complaint (Docket No. 9143) against Dairymen and Munford, Inc.² The FTC charged that Dairymen's acquisition of Farmbest violated Section 7 of the Clayton Act (*supra*, pp. 6-7) and Section 5 of the Federal Trade Commission Act.

From the outset of the administrative proceeding, Dairymen challenged the authority of the FTC to prosecute it. On October 9, 1980, Dairymen moved to dismiss

² Many thousands of additional documents were also produced by Dairymen under subpoena after issuance of the FTC complaint. The FTC also scheduled over 20 Dairymen and other officials for deposition taking.

the complaint. The motion challenged the FTC's authority to prosecute a Capper-Volstead agricultural cooperative where the conduct complained of is exempt from antitrust prosecution under the Capper-Volstead Act, Section 6 of the Clayton Act and Section 20(a) of the 1980 Act.

On January 8, 1981, the Administrative Law Judge (ALJ) denied Dairyemen's motion to dismiss. In doing so, however, he acknowledged that the FTC "undoubtedly had an obligation [under Section 20(a) of the 1980 Act] to consider the possibility of Capper-Volstead immunity before it issued the present complaint [against Dairyemen] for it could not otherwise comply with the [FTC] Improvements Act." There is nothing, however, in the FTC's complaint, or elsewhere, which establishes any action by the FTC to comply with the unequivocal statutory obligation of Section 20(a).

On January 12, 1981, Dairyemen filed an application with the ALJ for certification of the matter to the FTC for review. But the ALJ denied this application on February 25, 1981.

2. *The Judicial Proceedings.* On January 12, 1981, Dairyemen filed suit, in the United States District Court for the Western District of Kentucky, for temporary injunctive relief against further FTC discovery proceedings, pending a determination by the FTC of the issues raised in Dairyemen's motion to dismiss, or, a refusal to certify such issues by the ALJ to the FTC. The District Court (Judge Ballantine) granted a temporary restraining order staying discovery. On February 2, 1981, Judge Ballantine dissolved the temporary restraining order, denied preliminary injunctive relief and dismissed the action.

On March 8, 1981, Dairyemen filed a complaint, seeking a declaration on the merits as to Dairyemen's immunity from antitrust prosecution by the FTC for the acquisition of Farmbest.³ Dairyemen specifically sought a declaration that the FTC lacked authority to continue its prosecution of Dairyemen in view of the express prohibition contained in Section 20(a) of the 1980 Act. On August 5, 1981, the District Court (Judge Allen) sustained the FTC's motion to dismiss the complaint.

On July 30, 1982, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's refusal to enjoin the FTC antitrust prosecution against Dairyemen. The Court of Appeals reasoned that the prosecution is merely "an investigation" and such "a proceeding cannot be said to be in plain contravention" of Section 20(a) of the 1980 Act. App. A, 5a. On September 30, 1982, Dairyemen's timely petition for rehearing, accompanied by a suggestion for rehearing *en banc*, was denied by the Court of Appeals. App. A, 9a.

³The defendants named in the judicial proceedings were the Federal Trade Commission, its then Chairman Pertschuk, and its Commissioners Dixon, Clanton, Bailey and Pitofsky. Messrs. Dixon and Pitofsky have resigned. James C. Miller, III was sworn in as the new Chairman on September 30, 1981. Although no longer Chairman, Mr. Pertschuk is still a Commissioner. George W. Douglas was sworn in as a new Commissioner on December 27, 1982. Under Rule 25(d) of the Federal Rules of Civil Procedure and under this Court's Rule 40.3, Chairman Miller and Commissioner Douglas have both been "automatically substituted" and served as additional parties and respondents in this litigation.

REASONS FOR GRANTING THE PETITION⁴

The issue we raise is of national and fundamental importance. It calls for affirmation by this Court of the power of the federal courts to halt an administrative agency's defiance of express limitations placed by Congress on its jurisdiction. In that connection, we ask this Court to set aside the court below's postponement of judicial relief until final completion of the entire administrative proceeding where, as in this case, such postponement necessarily and irreparably deprives petitioner Dairymen of its statutory and constitutional right to effective relief.

In cases like the present one, relief delayed is relief forever denied. That is why the court below erred in denying judicial relief from illegal administrative agency action on the ground of prematurity. As we show below, the basic congressional purpose, in enacting Section 20(a)

⁴ As we noted in our application for an extension of time to file this petition, a pending settlement of the FTC administrative proceeding is under active consideration. The settlement has in fact been agreed to by petitioner Dairymen but has not yet been finally accepted by the Commission. If, as petitioner anticipates, the Commission finally accepts the settlement, the present legal controversy will be fully terminated and thus moot. This follows from the fact that acceptance of the settlement will of course terminate the FTC administrative proceeding. In turn, and since the basic relief sought by petitioner in the Federal District Court lawsuit was to enjoin the same FTC administrative proceeding, the termination of the latter proceeding will necessarily conclude and moot the lawsuit. It is well-settled that where a case becomes moot pending application for a writ of certiorari, this Court, on motion, will vacate the judgment below, and remand the case for dismissal by the trial court for mootness. *United States v. Munsingwear*, 340 U.S. 36 (1950). Accordingly, if the pending settlement is accepted by the Commission, we will promptly notify the Court of the resulting mootness by filing such a motion.

of the 1980 Act, was to free agricultural cooperatives from FTC administrative prosecutions and their accompanying, highly burdensome defense costs. Obviously, if the cooperative is forced to assume these burdensome expenses on a daily basis throughout the entire and lengthy period of postponement and until completion of the FTC proceedings, the express statutory purpose will be completely frustrated. As the Court recognized in *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 606 (1966), it would "stultify congressional purpose" to postpone relief in such a case. In comparable situations, this Court has consistently and understandably ruled that immediate access to judicial review must be made available to avoid the irreparable loss of statutory and constitutional rights. The decision below inexplicably conflicts with this Court's consistent rulings and buttresses the need for further review here.

1. *The basic congressional purpose, in enacting Section 20(a) of the 1980 Act, was to shield agricultural cooperatives against the "vast" and "punishing" costs of defending oppressive and disruptive FTC proceedings challenging conduct immunized from antitrust liability by the Capper-Volstead Act. The legislative history confirms this abiding congressional purpose in explicitly restricting FTC authority and in prohibiting the FTC from using any Treasury funds to prosecute agricultural cooperatives.*

Thus Representative Andrews, who initially introduced Section 20, summarized its purpose (125 Cong. Rec. H. 11190):

A multipaged subpoena [*sic*] requesting detailed business records over a long period of time presents a staggering blow to any farmer-owned cooperative. The amount of money these

cooperatives spend on man-hours collecting the requested data, not to mention legal fees, can be astronomical.

Farmer cooperatives, unlike other major corporations that can hire any number of attorneys to represent them, simply do not have the resources to finance such fights. Following the principle of operations at cost, all the returns to the cooperative besides those necessary to operate, are returned to farmers. So additional expenses, like attorneys fees, come directly out of the farmers' pockets.

* * *

The potential burdens that could be placed on farmer cooperatives by Federal regulatory agencies like the Federal Trade Commission can only serve to hinder the success of the small family farmer. It is deplorable for me to think that farmer money must be used to defend against Government intervention. I want to do everything I can to guard against this continuing high cost to farmers and their cooperatives. They have a much more important task than to spend their time and money fighting the FTC. They have a nation and much of the world to feed.

Reiterating the same legislative purpose, Representative Abdnor declared (125 Cong. Rec. H. 11190):

Mr. Chairman, if we as a body are truly sincere in making the 96th Congress the "Oversight Congress" as many proclaim, it behooves us to adopt this amendment and prevent this kind of duplication. Congress had stated its intent that agricultural cooperatives grow and prosper. Therefore, it is imperative that we correct a serious situation which has resulted in

cooperatives incurring significant expenses in dealing with the investigative whims of the FTC.

Representative Coelho also emphasized the fact that legal fees and direct expenses forced by FTC on agricultural cooperatives run into the millions of dollars. Unlike corporate giants, Mr. Coelho observed, the cooperatives cannot endure the fight against FTC for long because they lack the resources to finance it (125 Cong. Rec. H. 11192):

Against this background, the Federal Trade Commission is challenging cooperative practices which have been around for over 45 years, since the enactment of the Capper-Volstead Act, and which have been consistent with Congress intent. FTC investigations of cooperatives have created needless confusion and anxiety for both cooperative leaders and farmers. In one case, the FTC has actually filed a complaint against an agricultural cooperative. Legal fees and direct expenses are running into literally millions of dollars. When the FTC brings in its big guns to bear down on such business operations, cooperatives cannot endure the fight for very long. Farmer cooperatives, unlike corporate giants which can hire an untold number of attorneys to represent them, do not have the resources to finance such fights. Because they operate on a cost basis, all revenues exceeding operating expenses of the cooperative are returned to farmers. Likewise, extra expenditures to fight the FTC come directly out of the pockets of America's family farmers.

The FTC's involvement is [*sic*] regulating cooperatives is expensive for the taxpayers, disruptive for the agricultural community at large, and duplicative. The public wants less regulation, not more.

If the FTC is permitted to continue its wanton irresponsible vendetta against agricultural cooperatives, the whole foundation of agriculture—the backbone of our economy—will be rocked with incalculable costs to both farmers and consumers.

Finally, in expressing the same legislative purpose to put a stop to FTC's saddling the cooperatives with "vast" fees and expenses, Congressman Johnson stated (125 Cong. Rec. H. 11201):

Actions of the FTC are, however, not without impact. The first is to waste countless hours of Commission and staff time aggressively seeking out potential wrongdoers, but without effect and without purposeful prospects. The second impact is to require several cooperatives to spend vast, cruel and punishing legal fees simply to satisfy what appears to many as an attempt by the Commission and staff to assert jurisdiction in an area Congress reserved to others.⁵

2. *Where, as here, postponement of judicial review until conclusion of the FTC proceeding would nullify the congressional purpose underlying the 1980 Act, access to judicial review must be provided at the outset of the FTC*

⁵ The other chief purpose of Section 20(a) was to make certain that "the FTC has to stay away—totally" from antitrust prosecution of Capper-Volstead cooperatives. See 126 Cong. Rec. S. 5680, for Senator Ford's remarks. Since "Congress [had earlier] clearly vested in the Department of Agriculture exclusive jurisdiction over all activities of farmer cooperatives," there was no room, or need, for FTC investigation or prosecution in this area. See 125 Cong. Rec. H. 11201 for Congressman Johnson's remarks. And that is why Section 20(a) expressly prohibits the FTC from diverting any congressional appropriations to such investigations or prosecutions. As noted in footnote 1, *supra*, p. i) our brief on the merits will, if certiorari is granted, specifically address this question.

proceeding. Section 20(a) of the 1980 Act (*supra*, pp. 2-3) explicitly denies the FTC "any authority to use any funds" for "any study, investigation, or prosecution of any agricultural cooperative for any conduct" exempt from antitrust enforcement by the Capper-Volstead Act (7 U.S.C. § 291).⁶ We have already shown that the dominant congressional purpose of this statutory prohibition was to safeguard the agricultural cooperatives against the heavy and burdensome costs of defending against FTC proceedings. Failure to grant the cooperative access to judicial review at the outset of the FTC proceeding against it means that the cooperative will be forced to incur the burdensome expenses on a day-to-day basis until the lengthy administrative proceeding has been finally concluded. By that time, of course, judicial review would be ineffective because tremendous expenses will already have been forced on the cooperative, jeopardizing its financial stability and continued existence. These adverse consequences constitute the very evil Congress sought to avoid by enacting Section 20(a). Only by affording timely access to judicial review is it possible to fulfill the congressional purpose underlying Section 20(a) and give the cooperatives the relief Congress sought to provide.

3. *The refusal of the court below to afford timely relief is in direct conflict with the settled course of decisions by*

⁶ Since Section 20(a) applies, in terms, to FTC "investigations" as well as FTC "prosecutions", the court below plainly erred in assuming that the restrictions placed by the statute on the FTC could be ignored by characterizing the FTC proceeding as merely "an investigation". App. A, 5a. In any event, the proceeding plainly went beyond the "investigation" stage and into active "prosecution" on July 31, 1980, when the FTC issued its complaint against petitioner Dairymen in FTC Docket No. 9143.

this Court. The decision below, insisting on postponement despite the resulting nullification of Section 20(a)'s purpose, is at war with the "basic presumption of judicial review" availability to enjoin unconstitutional agency action, or agency action without jurisdiction. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

This Court, relying on considerations outlined above, and using a flexible approach in interpreting the concept of "finality" of judgments, has consistently ruled that orders which are not the last in temporal sequence in a suit are nevertheless reviewable on appeal. This is true even though the hallmark of federal appellate jurisdiction is the "final judgment" rule under which, generally, an appeal lies only from an order terminating the entire litigation in the trial court. 28 U.S.C. § 1291. It is equally true with respect to the Administrative Procedure Act's "final agency action" requirement. Section 10(c), 5 U.S.C. § 704, *supra*, p. 7.

This flexible approach was initially used by the Court over 130 years ago in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). There the Court approved review of an order immediately transferring property to a trustee in bankruptcy, even though there still remained undecided in the trial court all of the issues pertaining to an accounting of the rents and profits. The Court recognized that there was no way the effect of the transfer order could be effectively reversed on final appeal since the land transferred was to be swiftly sold for the benefit of creditors. Accordingly, the Court allowed the appeal from the interlocutory transfer order because denial of such review would have resulted in irreparable injury.

Similarly, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court reiterated the principle that an appeal must be provided in those situa-

tions where the pre-trial interlocutory order could not be effectively reviewed on a final appeal. *Cohen* was a shareholder's derivative suit against the loan corporation. The district court, in a pre-trial order, denied the defendant's motion for security, holding inapplicable a state law requiring plaintiffs to post a security bond. This Court, in holding the pre-trial order to be appealable and reviewable, noted that if review on appeal were to be postponed until the termination of the litigation, "it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." 337 U.S. 541, 546.

The same principle applies with equal force to the need for providing effective and timely access to judicial review of administrative agency action rather than postponing such review until completion of the entire administrative proceeding. For example, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the court ruled that the "impact of the regulations upon the petitioners is sufficiently direct and immediate so as to render the issue [of validity of a regulation] appropriate for judicial review" even prior to enforcement of the regulation. See also *Gardner v. Toilet Goods Ass'n.*, 387 U.S. 167 (1967).

The decision below clashes directly with this Court's holdings in each of the cited cases. Nor can the decision below possibly be squared with this Court's holding in *Leedom v. Kyne*, 358 U.S. 184 (1958). The court below seeks to justify its failure to follow *Leedom* by characterizing the prohibitory language of Section 20(a) of the 1980 Act as "unlike the explicit prohibition" in the NLRA provision in the *Leedom* case. But the only respect in which Section 20(a) differs on this point is that the prohibitory language in Section 20(a), in expressly deny-

ing the FTC the right to use appropriated funds, is far *more* explicit than the NLRA provision. The entirely untenable distinction of *Leedom*, relied on by the court below, confirms the need for further review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

D. PAUL ALAGIA, JR.

JOSEPH M. DAY

BARNETT & ALAGIA

444 South Fifth Street

Louisville, Kentucky 40202

(502) 585-4131

/s/ RICHARD A. GLADSTONE
MORTON HOLLANDER*

BARNETT & ALAGIA

1000 Thomas Jefferson Street, N.W.

Washington, D.C. 20007

(202) 342-0342

Counsel for Dairymen, Inc.

**Counsel of Record*

February 25, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 1983, three copies of this Petition and Appendix were mailed, postage prepaid, to counsel for the respondents as follows:

The Honorable Rex E. Lee
Solicitor General of the
United States
United States Department of Justice
Washington, D.C. 20530

Howard E. Shapiro, Deputy General Counsel
Joanne L. Levine, Esquire
Office of the General Counsel
Federal Trade Commission
7th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Ronald E. Meredith, Esquire
United States Attorney
Room 211, U.S. Courthouse
601 West Broadway
Louisville, Kentucky 40202

Additional copies have been mailed, postage prepaid, directed to each of the following:

James C. Miller, III, Chairman
Federal Trade Commission
7th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Michael Pertschuk, Commissioner
David A. Clanton, Commissioner
Patricia P. Bailey, Commissioner
George W. Douglas, Commissioner
Federal Trade Commission
7th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Robert Pitofsky, Esquire
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Paul Rand Dixon, Esquire
5911 Carlton Lane
Glen Mar Park, Maryland 20816

I further certify that all parties required to be served
have been served.

/s/
Morton Hollander

BARNETT & ALAGIA
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
Counsel for Dairymen, Inc.

APPENDIX A

APPENDIX A

1. Opinion Of The United States Court Of Appeals For
The Sixth Circuit, July 30, 1982 1a
2. Judgment Of The United States Court of Appeals
For The Sixth Circuit, July 30, 1982 7a
3. Order Of The United States Court Of Appeals For
The Sixth Circuit, Denying Rehearing, September
30, 1982 9a

**1. Opinion Of The United States Court Of Appeals For The
Sixth Circuit, July 30, 1982**

Nos. 81-5411, 81-5679

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DAIRYMEN, INC.,
Plaintiff-Appellant,
v.

**FEDERAL TRADE COMMISSION, MICHAEL PERTSCHUK,
PAUL RAND DIXON, DAVID A. CLANTON,
PATRICIA P. BAILEY AND ROBERT PITOFSKY,**
Defendants-Appellees.

**Appeal from the United States District Court for the Western
District of Kentucky**

Decided and Filed July 30, 1982

Before: EDWARDS, Chief Circuit Judge, KENNEDY, Circuit
Judge, and CELEBREZZE, Senior Circuit Judge.

EDWARDS, Chief Judge. Appellant Dairymen, Inc., appeals from two judgments denying it interlocutory relief from certain proceedings initiated by the Federal Trade Commission. In July 1980, the FTC issued an administrative complaint against Dairymen, an agricultural cooperative, after it had acquired Farmbest Foods, Inc., a dairy processor that had been privately owned, as opposed to cooperatively owned. The complaint alleged that the acquisition, by its anticompetitive effect, violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act. Dairymen filed and the ALJ denied a motion to dismiss the complaint on the ground that agricultural cooperatives were exempt (under the Capper-Volstead Act, § 6 of the Clayton Act, and § 20(a) of the FTC Improvements Act of 1980) from the federal antitrust laws and the jurisdiction of the FTC. Dairymen then brought an action in the United

States District Court for the Western District of Kentucky seeking a temporary restraining order barring any further administrative proceedings against it.

The District Judge issued a temporary restraining order and subsequently conducted a hearing as to whether a preliminary injunction should issue. Thereafter, the District Judge handed down a decision denying the preliminary injunction and dissolving the temporary restraining order. He held that no final agency action had been taken that might call for judicial review under § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704 (1976). Subsequently a similar action was filed by Dairy-men before another District Judge in the Western District of Kentucky who likewise dismissed the complaint for lack of final agency action, adding as alternative grounds the doctrines of res judicata and collateral estoppel in light of the preceding District Judge's decision.

We believe that these appeals present one dispositive issue, namely, whether the requirement of "final agency action" forbids judicial consideration of Dairy-men's claim of exemption from the antitrust laws and the Federal Trade Commission Act until completion of the FTC proceedings. We hold that it does.

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides as follows:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The first of the District Judges who heard this matter, Judge Thomas A. Ballantine, Jr., held as follows:

It is significant that the relief sought here is not judicial review of an agency decision, but rather a stay of the administrative discovery process pending a ruling on the motion to dismiss. However, at the hearing, counsel for DI expressed an intention to seek judicial review should the FTC decide against DI on its motion for interlocutory review. The Court notes that judicial review in such a case would no doubt be precluded by the doctrine of exhaustion of administrative remedies, *McKart* [v. *United States*, 395 U.S. 185 (1969)], and the absence of a "final agency action" as required by Section 10(c) of the Administrative Procedure Act, 5 U.S.C. Section 704. [*FTC v. Standard Oil Co.*, 449 U.S. 232 (1980)].

The second of the District Judges, Judge Charles M. Allen, found as follows:

In the interest of judicial economy, however, we express the alternative opinion that the matter must be dismissed for lack of jurisdiction due to lack of final agency action. While we do not quarrel with the principle that there exists an exception to the requirement of final agency action when the agency is operating beyond its jurisdiction, this case does not present the opportunity to decide this issue on legal grounds alone.

This court agrees with the reasoning set forth above by each of the two named District Judges. Cf. *First National Monetary Corp. v. Commodity Futures Trading Commission*, 677 F.2d 522, 526 (6th Cir. 1982) (requirement of "final agency action" bars interlocutory judicial intervention when claim is that agency should proceed by rulemaking rather than adjudication).

We do not believe that Dairymen's reliance on *Leedom v. Kyne*, 358 U.S. 184 (1958), is appropriate. The *Leedom* Court authorized an exception to the general rule that forbids judicial interference with the regular course of administrative proceedings. In that case, the NLRB combined professional

and nonprofessional employees in the same bargaining unit without the former's consent. This despite the fact that § 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1), declared that:

the Board shall not . . . decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.

An original suit was brought by the professional employees in federal district court to set aside the NLRB's action. The Supreme Court held that lack of completion of the prescribed administrative process did not bar the suit in district court.

[The suit] is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9(b)(1) is clear and mandatory. . . . Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

358 U.S. at 188-89.

Dairymen argues that § 20(a) of the Federal Trade Commission Improvements Act of 1980, 94 Stat. 393, negates FTC jurisdiction, grants immunity from prosecution, or otherwise prevents the Commission from proceeding against any agricultural cooperative. Section 20(a) provides as follows:

The Federal Trade Commission shall not have any authority to use any funds which are authorized to be appropriated to carry out the Federal Trade Commission Act (15 U.S.C. 41 et seq.) for fiscal year 1980, 1981, or 1982, under section 24 of such Act, as amended by section 17 and as so redesignated in section 13, for the purpose of conducting any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Act entitled "An Act to authorize associa-

tion of producers of agricultural products", approved February 18, 1922 (7 U.S.C. 291 et seq.), commonly known as the Capper-Volstead Act, is not a violation of any Federal antitrust Act or the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

Recent cases have limited the *Leedom* exception to the exhaustion requirement to jurisdictional defects which are apparent on the face of the record, *California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1324 (9th Cir.), cert. denied, 434 U.S. 876 (1977); see generally *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *Boire v. Greyhound Corp.*, 376 U.S. 473, 480 (1964), and in plain contravention of a statutory mandate, *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir.), cert. denied, 414 U.S. 877 (1973).

Our reading of § 20(a) simply does not agree with that urged upon us by Dairymen. As we understand the FTC proceeding, it is an investigation to determine whether or not Dairymen's conduct in acquiring Farmbest was a violation of federal antitrust laws or the Federal Trade Commission Act. Such a proceeding cannot be said to be in plain contravention of a statutory mandate on the face of the record before us. The mandate of § 20(a) is unlike the explicit prohibition contained in § 9(b)(1) of the NLRA, which was central to *Leedom*.

Dairymen also argues that the Secretary of Agriculture has exclusive jurisdiction over Capper-Volstead agricultural cooperatives to initiate Sherman or Clayton Act prosecutions. It is clear, however, that the Secretary's jurisdiction is not exclusive. *Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 462-63 (1960) (Department of Justice); *United States v. Borden Co.*, 308 U.S. 188, 205-06 (1939) (Department of Justice). Whether the FTC stands on the same footing as the Department of Justice under *Milk Producers* and *Borden* must initially be determined by the administrative agency. Once again it is not apparent on the face of the record that the FTC is acting "in excess of its delegated powers and contrary to a specific [statutory] prohibition." *Leedom v. Kyne*, 358 U.S. at 188.

The judgments previously entered in the two District Courts in the Western District of Kentucky are hereby affirmed.

**2. Judgment Of The United States Court Of Appeals For The
Sixth Circuit, July 30, 1982**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Nos. 81-5411, 81-5679

DAIRYMEN, INC.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, MICHAEL PERTSCHUK,

PAUL RAND DIXON, DAVID A. CLANTON,

PATRICIA P. BAILEY AND ROBERT PITOFSKY,

Defendants-Appellees.

**Before: EDWARDS, Chief Circuit Judge, KENNEDY, Circuit
Judge, and CELEBREZZE, Senior Circuit Judge.**

JUDGMENT

**APPEAL from the United States District Court for the
Western District of Kentucky.**

THIS CAUSE came on to be heard on the record from the
United States District Court for the Western District of Ken-
tucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court that the judgment of the

said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: October 12, 1982

A True Copy

COSTS: NONE

Attest:

Filing Fee \$

/s/ Audrey Crockett

Printing \$

Deputy Clerk

Total \$

**3. Order Of The United States Court Of Appeals For The
Sixth Circuit, Denying Rehearing, September 30, 1982**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DAIRYMEN, INC., *Plaintiff-Appellant,*

v.

FEDERAL TRADE COMMISSION, MICHAEL PERTSCHUK,
PAUL RAND DIXON, DAVID A. CLANTON,
PATRICIA P. BAILEY AND ROBERT PITOFSKY,
Defendants-Appellees.

ORDER

Before: EDWARDS, Chief Circuit Judge, KENNEDY, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc, and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion.

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the court

/s/ John P. Hehman
Clerk

APPENDIX B

APPENDIX B

1. Opinion Of The United States District Court For The Western District Of Kentucky, February 2, 1981 (Judge Ballantine) 10a
2. Order Of The United States District Court For The Western District of Kentucky, February 2, 1981 (Judge Ballantine) 15a
3. Memorandum Of The United States District Court For the Western District Of Kentucky, March 31, 1981 (Judge Ballantine) 16a
4. Amended Order Of The United States District Court For The Western District Of Kentucky, March 31, 1981 (Judge Ballantine) 17a
5. Memorandum Opinion Of The United States District Court For The Western District Of Kentucky, August 5, 1981 (Judge Allen) 19a
6. Judgment Of The United States District Court For The Western District Of Kentucky, August 5, 1981 (Judge Allen) 22a

**1. Opinion Of The United States District Court For The
Western District Of Kentucky, February 2, 1981 (Judge
Ballantine)**

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

DAIRYMEN, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, *et al.*

Defendants.

No. C 81-0014-L(B)

MEMORANDUM

Plaintiff, Dairymen, Inc. (DI), an agricultural cooperative of dairy farmers, acquired Farmbest Foods, Inc. (Farmbest) on September 1, 1978. The acquisition became the subject of a lengthy investigation by the Federal Trade Commission (FTC), which resulted in the issuance of an FTC complaint charging DI with violations of Section 7 of the Clayton Act, 15 U.S.C. Section 18, and Section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. Section 45. Thereafter DI filed a motion to dismiss the administrative complaint for lack of jurisdiction, alleging lack of subject matter jurisdiction, lack of jurisdiction over DI under the facts alleged in the complaint, failure to state a claim upon which relief can be granted, and disregard of statutory jurisdictional prerequisites. The fundamental issue presented by the motion to dismiss is whether the issuance of the complaint is precluded by antitrust immunity conferred upon agricultural cooperatives by Section 6 of the Clayton Act, 15 U.S.C. Section 17, the Capper-Volstead Act, 7 U.S.C. Sections 291-92, and Section 20 of the Federal Trade Commission Improvements Act of 1980 (Improvements Act),

Pub.L. No. 96-252, 94 Stat. 393 (1980). The presiding Administrative Law Judge (ALJ), having determined that 1) neither Section 6 of the Clayton Act nor the Capper-Volstead Act prevented the FTC from exercising jurisdiction over DI or issuing a complaint challenging the acquisition of Farmbest, and 2) DI could not presently challenge the FTC's compliance with the Improvements Act, denied DI's motion to dismiss. The ALJ, however, reserved ruling on the issue of whether *Maryland & Virginia Milk Producers Ass'n. v. United States*, 362 U.S. 458 (1960), requires proof of predatory intent before the FTC can find that a cooperative has violated Section 7 of the Clayton Act and Section 5 of the FTCA:

"This ruling does not deal with the merits of DI's arguments that the challenged acquisition is exempt from antitrust challenge by virtue of these statutes and the Supreme Court's decision in *Maryland and Virginia*. This issue will be decided after evidentiary hearings are held and the parties file their proposed findings."

The order denying the motion to dismiss was dated January 8, 1981. On January 12, DI filed a motion for interlocutory review by the FTC of the ALJ's order and moved for a stay of further proceedings pending resolution of interlocutory review. (The latter motion was denied by the ALJ, and the former is pending before the FTC). DI instituted this action the same day, seeking to restrain further discovery until the issuance of an FTC ruling on the motion to dismiss. The Court entered a temporary restraining order and assigned the matter to January 28 for a hearing on DI's motion for preliminary injunction.

DI, as applicant for preliminary injunctive relief, bears the burden of showing that four standards are met:

- 1) A strong and substantial likelihood or probability of success on the merits;
- 2) Irreparable injury in the absence of injunctive relief;
- 3) Injunctive relief would not cause substantial harm to others;

- 4) Issuance of a preliminary injunction would serve the public interest.

Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977).¹

DI alleges that commencement of discovery and other administrative procedures during the pendency of its motion for interlocutory administrative review will cause irreparable harm consisting of: 1) substantial financial loss to DI and enormous waste of government resources and funds, 2) complete restructuring of the dairy industry, 3) upsetting of the relationship between federal statutes, and 4) substantially impede DI's ability to conduct business on a continuing basis. The only nonspeculative injuries to DI are the expense and disruption of defending itself in protracted adjudicatory proceedings. It is beyond cavil that mere litigation expense, even substantial and unreasonable cost, does not constitute irreparable harm. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974). "Even if the necessary costs will be paid by the public, litigation expense remains immaterial." *Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir.), *cert. denied*, 434 U.S. 876 (1977). Nor does the annoyance and disruption of litigation constitute irreparable harm. *FTC v. Standard Oil Co. of Cal. (Socal)*, ___ U.S. ___, 101 S.Ct. 488, 495 (1980). Inasmuch as DI has failed to make the requisite showing of irreparable injury, the motion for a preliminary injunction must be denied.

In addition to its failure to show irreparable harm, DI has not shown a substantial likelihood of success on the merits. The

¹ DI's reliance upon the more flexible standard of *Roth v. Bank of the Commonwealth*, 583 F.2d 527 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979), is misplaced. Roth adopted the position taken in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953). The Second Circuit has since made clear that the *Hamilton Watch* standard does not apply when, as here, governmental action is challenged. *Union Carbide Agricultural Prod. Co. v. Costle*, 632 F.2d 1014 (2d Cir. 1980).

parties conceded at the hearing that the issues raised in the motion to dismiss are of "first impression" and involve "close questions." Since it is far from clear whether jurisdictional defects are present, the FTC may well decide that discovery is necessary to resolve the issues raised. See *McKart v. United States*, 395 U.S. 185, 194 (1969); *FTC v. Markin*, 532 F.2d 541, 542 (6th Cir. 1976).

The Court is also of the opinion that issuance of a preliminary injunction will not serve the public interest. DI is in essence asking the Court to interfere with the proper functioning of an administrative agency. Judicial intervention into the agency process "denies the agency an opportunity to correct its own mistakes and to apply its expertise" and "leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Socal, supra*, at 494.

It is significant that the relief sought here is not judicial review of an agency decision, but rather a stay of the administrative discovery process pending a ruling on the motion to dismiss. However, at the hearing counsel for DI expressed an intention to seek judicial review should the FTC decide against DI on its motion for interlocutory review. The Court notes that judicial review in such a case would no doubt be precluded by the doctrine of exhaustion of administrative remedies, *McKart, supra*, and the absence of a "final agency action" as required by Section 10(c) of the Administrative Procedure Act, 5 U.S.C. Section 704. *Socal, supra*.

The temporary restraining order entered herein January 12 will be hereby dissolved, plaintiff's motion for preliminary injunction will be denied, and this action will be dismissed.

An appropriate Order has been entered this 2nd day of February, 1981.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Counsel of Record

2. Order Of The United States District Court For The Western District Of Kentucky, February 2, 1981 (Judge Ballantine)

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

DAIRYMEN, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.

Defendants.

No. C 81-0014-L(B)

ORDER

For the reasons set forth in the Memorandum filed this date,
IT IS ORDERED:

(1) The temporary restraining order entered January 12, 1981, be and it hereby is dissolved;

(2) Plaintiff's motion for preliminary injunction be and it hereby is denied;

(3) This action be and it hereby is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable Order.

This 2nd day of February, 1981.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Counsel of Record

**3. Memorandum Of The United States District Court For
The Western District Of Kentucky, March 31, 1981 (Judge
Ballantine)**

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

DAIRYMEN, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.

Defendants.

No. C 81-0014-L(B)

MEMORANDUM

This matter is before the Court on the motion of the plaintiff to alter or amend the Order entered February 2, 1981. The Court has considered the memoranda of plaintiff and defendant and is not persuaded that the Order should be altered or amended. It appears, however, that defendant has no objection to amending Paragraph 3 of the Order to provide that the dismissal be without prejudice to the merits of plaintiff's claim of exemption under the antitrust laws. The Court will therefore enter an amended Order.

This 31st day of March, 1981.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Counsel of Record

**4. Amended Order Of The United States District Court For
The Western District Of Kentucky, March 31, 1981 (Judge
Ballantine)**

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

DAIRYMEN, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, *et al.*

Defendants.

No. C 81-0014-L(B)

AMENDED ORDER

For the reasons set forth in the Memorandum filed February 2, 1981,

IT IS ORDERED:

(1) The temporary restraining order entered January 12, 1981, be and it hereby is dissolved;

(2) Plaintiff's motion for preliminary injunction be and it hereby is denied;

(3) This action be and it hereby is dismissed with prejudice; provided, however, that this dismissal is without prejudice to the merits of plaintiff's claim of exemption under the antitrust laws.

There is no just reason for delay, and this is a final and appealable Order.

This 31st day of March, 1981.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Counsel of Record

**5. Memorandum Opinion Of The United States District
Court For The Western District Of Kentucky, August 5,
1981 (Judge Allen)**

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

DAIRYMEN, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, *et al.*

Defendants.

No. C 81-0169-L(A)

MEMORANDUM OPINION

Defendants have begun an administrative adjudicative proceeding against plaintiff due to circumstances which implicate antitrust considerations. It is plaintiff's belief that certain statutory exemptions granted agricultural cooperatives prohibit defendant from proceeding with its administrative action.

Early this year, plaintiff filed an action against defendant in this Court, seeking an order enjoining defendant from proceeding with discovery pending defendants' ruling on plaintiff's motion to dismiss the administrative action. *Dairymen, Inc. v. FTC*, Civil Action No. 81-0014 L(B) (W.D. Ky. 1981). In an opinion which pointed out that plaintiff could not satisfy the requirements for preliminary injunctive relief, Judge Thomas A. Ballantine, Jr. denied relief and dismissed the case. Plaintiff then filed the present action, seeking a declaration that defendant is without authority to continue the administrative proceeding and an injunction restraining defendant from so continuing. Defendant has moved to dismiss on grounds of collateral estoppel or *res judicata*.

After the opinion and order were entered in C 81-0014, the parties agreed to an amendment of the order, such that it reads, in part, as follows:

(3) This action be and it hereby is dismissed with prejudice; provided, however, that the dismissal is without prejudice to the merits of plaintiff's claim of exemption under the antitrust laws.

Plaintiff argues that the reservation of rights contained in the latter clause prevents the application of the doctrine of *res judicata*, since it means there was no "final judgment" as required by *Montana v. United States*, 440 U.S. 147 (1979). We believe that a vigorous legal system is not entirely comfortable with such emphasis on technicality. It seems clear to this reader that the order was final as to plaintiff's claim that administrative proceedings should be interrupted and enjoined, although plaintiff's argument regarding exemption could be presented at the appropriate time, following exhaustion of administrative remedies.

At any rate, it appears that considerations of collateral estoppel are applicable. There is no question that ripeness concerns contributed to Judge Ballantine's decision. In ruling that plaintiff could not show a substantial likelihood of success on the merits, the opinion stated:

"The parties conceded at the hearing that the issues raised in the motion to dismiss are of "first impression" and involve "close questions." Since it is far from clear whether jurisdictional defects are present, the FTC may well decide that discovery is necessary to resolve the issues raised."

The opinion also includes the following language, although it could be classified as mere dictum:

"It is significant that the relief sought here is not judicial review of an agency decision, but rather a stay of the administrative discovery process pending a ruling on the motion to dismiss. However, at the hearing counsel for DI expressed an intention to seek judicial review should the FTC decide against DI on

its motion for interlocutory review. The Court notes that judicial review in such a case would no doubt be precluded by the doctrine of exhaustion of administrative remedies, and the absence of a "final agency action" as required by Section 10(c) of the Administrative Procedure Act." (citations omitted)

It is clear that the issue of significance in C 81-0014 was whether this Court has authority to halt agency proceedings prior to final action on the basis of a contested claim of lack of jurisdiction to proceed. That issue was decided adverse to plaintiff. While the posture of the administrative action may have changed slightly since entry of that opinion, all operative facts remain the same. We are of the opinion that principles of collateral estoppel bar the present action, and it must be dismissed.

In the interest of judicial economy, however, we express the alternative opinion that the matter must be dismissed for lack of jurisdiction due to lack of final agency action. While we do not quarrel with the principle that there exists an exception to the requirement of final agency action when the agency is operating beyond its jurisdiction, this case does not present the opportunity to decide this issue on legal grounds alone. Plaintiff concedes that the exemption granted it does not extend to predatory behavior, and factual investigation would be necessary in order to determine predation.

A judgment in conformity herewith has this day been entered.

Dated 8/5/81

/s/ Charles M. Allen
CHARLES M. ALLEN
Chief Judge

cc: Counsel of Record

**6. Judgment Of The United States District Court For The
Western District Of Kentucky, August 5, 1981 (Judge
Allen)**

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

DAIRYMEN, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.

Defendants.

No. C 81-0169-L(A)

JUDGMENT

This matter, having come before the Court on defendants' motion to dismiss, and the Court, having entered its memorandum opinion and being advised,

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss be and it is hereby sustained and the complaint herein is dismissed with prejudice.

This is a final and appealable judgment and there is no just cause for delay.

Dated 8/5/81

/s/ Charles M. Allen
CHARLES M. ALLEN
Chief Judge

cc: Counsel of Record

MAY 16 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1428

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAIRYMEN, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION**

REX E. LEE

*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

JOHN H. CARLEY
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

LESLIE RICE MELMAN
JOANNE L. LEVINE
*Attorneys
Federal Trade Commission
Washington, D.C. 20580*

QUESTION PRESENTED

Whether an agricultural cooperative's claim of exemption from Federal Trade Commission proceedings challenging its acquisition of a processor is subject to interlocutory judicial review in the district court prior to final agency action.

(I)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136	7
<i>Case-Swayne Co., Inc. v. Sunkist Growers, Inc.</i> , 389 U.S. 384	5
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541	11
<i>FTC v. Morton Salt Co.</i> , 334 U.S. 37	6
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232	3, 6, 7, 9, 10, 11
<i>Forgay v. Conrad</i> , 47 U.S. (6 How.) 201	11
<i>General Finance Corp. v. FTC</i> , 700 F.2d 366	11
<i>Leedom v. Kyne</i> , 358 U.S. 184	4, 10, 11
<i>Maryland & Virginia Milk Producers Ass'n v. United States</i> , 362 U.S. 458	5
<i>Ringsby Truck Lines, Inc. v. Western Conf. of Teamsters</i> , 686 F.2d 720	12

IV

Page

Cases—Continued:

<i>Sunkist Growers, Inc. v. FTC</i> , 464 F.Supp. 302, appeal dismissed, No. 79-3091 (9th Cir. Sept. 14, 1981)	7
<i>United States v. Borden Co.</i> , 308 U.S. 188	5
<i>United States v. Dairymen, Inc.</i> , 660 F.2d 192	5
<i>United States v. First City National Bank</i> , 386 U.S. 361	6
<i>Velsicol Chemical Corp. v. United States</i> , 435 U.S. 942	12

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C.

(& Supp. V) 551 *et seq.* :

5 U.S.C. 557 (Section 8)	3
5 U.S.C. 557(b)	6
5 U.S.C. (Supp. V) 559	10
5 U.S.C. 701 <i>et seq.</i>	6
5 U.S.C. 703 (Section 10(b))	10
5 U.S.C. 704 (Section 10(c))	2, 3
5 U.S.C. 706(2)(C)	9

Capper-Volstead Act, 7 U.S.C.

291-292	2, 3, 5
---------------	---------

Clayton Act, 15 U.S.C. 12 *et seq.* :

15 U.S.C. 17 (Section 6)	2
15 U.S.C. 18 (Section 7)	2, 5
15 U.S.C. 21(c)	2, 6, 10, 11
15 U.S.C. 21(g)	2

Statutes and regulations—Continued:

Federal Trade Commission Act, 15 U.S.C.

(& Supp. V) 41 *et seq.* :

15 U.S.C. (& Supp. V) 45 (Section 5) 2

15 U.S.C. (& Supp. V) 45(c) 2, 6, 10, 11

15 U.S.C. (& Supp. V) 45(g) 2

Federal Trade Commission Improvements

Act of 1980, Pub. L. No. 96-252,

Section 20(a), 94 Stat. 393, 15 U.S.C.

(Supp. V) 57c note 2, 3, 8, 9

16 C.F.R. :

Section 3.23 3

Section 3.25(f) 11

Section 3.51 6

Section 3.52 6

Section 3.53 6

Section 3.54 6

Miscellaneous:

P. Areeda, *Antitrust Analysis* (3d ed.

1981) 5

126 Cong. Rec. :

pp. H3859-H3860 (daily ed. May 20,
1980) 8

p. H3870 (daily ed. May 20, 1980) 8

p. S5682 (daily ed. May 21, 1980) 8

H.R. 2313, 96th Cong., 1st Sess. (1979) 9

H.R. Rep. No. 96-917, 96th Cong., 2d Sess.

(1980) 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1428

DAIRYMEN, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 684 F.2d 376. The opinions of the district court (Pet. App. 10a-14a, 16a, 19a-21a) are not reported. The rulings of the administrative law judge denying petitioner's motions to dismiss a Federal Trade Commission administrative complaint and to suspend or stay discovery (C.A. App. 219-226)¹ are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on July 30, 1982. A petition for rehearing was denied on September 30, 1982 (Pet. App. 9a). On December 16, 1982, Justice O'Connor extended the time to petition for

¹"C.A. App." refers to the joint appendix in the court of appeals.

a writ of certiorari to February 27, 1983. The petition was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 6-7 of the Clayton Act, 15 U.S.C. (& Supp. V) 17-18, Section 20(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. V) 57c note, the Capper-Volstead Act, 7 U.S.C. 291-292, and Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, are set forth at Pet. 2-7.

STATEMENT

On July 31, 1980, the Federal Trade Commission issued an administrative complaint charging that petitioner had violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45, by its acquisition in September 1978 of Farmbest Foods, Inc. (C.A. App. 19). Petitioner is an agricultural cooperative engaged in the production, processing, and distribution of milk and dairy products. Farmbest, before its acquisition, was a privately owned processor of dairy products.

The complaint alleged that petitioner is "a corporation subject to the jurisdiction of the Commission" (C.A. App. 20) and that the effect of the acquisition "may be substantially to lessen competition or to tend to create a monopoly in the processing and sale of fluid milk" (*id.* at 27). If, after hearings on the complaint, the Commission orders divestiture, petitioner may petition the appropriate court of appeals for judicial review. 15 U.S.C. 21(c), 45(c). The Commission's order is stayed by operation of law until judicial review is completed. 15 U.S.C. 21(g), 45(g).

The case was referred to an administrative law judge. Petitioner moved to dismiss the complaint, asserting that

under Section 6 of the Clayton Act (15 U.S.C. 17), the Capper-Volstead Act (7 U.S.C. 291-292), and Section 20(a) of the Federal Trade Commission Improvements Act of 1980 (Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. V) 57c note), the Commission was barred from challenging the Farmbest acquisition. Petitioner asserted that the Commission may challenge an acquisition by an agricultural cooperative only if its complaint alleges that the acquisition is predatory (C.A. App. 30-77). Petitioner also moved to stay discovery pending disposition of the motion to dismiss (*id.* at 127-132). The ALJ denied both motions, holding that petitioner's status as an agricultural cooperative did not in itself preclude the Commission's challenge to the acquisition. He reserved judgment on petitioner's claim that the complaint must allege predatory conduct (*id.* at 219-226).²

Petitioner requested the ALJ to certify the exemption issue to the Commission for interlocutory review.³ That same day petitioner filed suit in the Western District of Kentucky, seeking an injunction prohibiting further discovery proceedings until the FTC ruled on its motion to dismiss (Pet. App. 11a). The district court, relying on *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), held that petitioner had not shown that it would suffer irreparable injury. The court also noted that judicial review of petitioner's underlying exemption claim—should the FTC rule adversely on the motion for interlocutory review—would be precluded at this stage of the administrative proceedings by the failure to exhaust administrative remedies and the absence of “final agency action” (Pet. App. 13a). See 5 U.S.C. 704.

²By order of July 22, 1982, the ALJ rejected petitioner's claim that predation must be alleged.

³Under Section 3.23 of the Commission's Rule of Practice and Procedure, 16 C.F.R. 3.23, and Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, the Commission ordinarily does not consider matters in adjudication before an ALJ except on appeal from the ALJ's Initial Decision.

The ALJ subsequently denied petitioner's motion to certify the exemption issue to the Commission (C.A. App. 319). Petitioner then filed a second action ("*Dairymen II*") in the Western District of Kentucky to enjoin the proceedings before the Commission, asserting that its acquisition of Farmbest was immune from antitrust scrutiny by the FTC. The district court dismissed the complaint on grounds of collateral estoppel (Pet. App. 20a-21a). The court added, as an alternative ground, that it lacked jurisdiction because the Commission had taken no "final agency action" (*id.* at 21a).

3. On petitioner's appeals,⁴ the Sixth Circuit affirmed both rulings. It held that the Administrative Procedure Act's requirement of final agency action "forbids judicial consideration of Dairymen's claim of exemption * * * until completion of the FTC proceedings" (Pet. App. 2a). The court stated that the exception to the finality requirement enunciated in *Leedom v. Kyne*, 358 U.S. 184 (1958), was limited to "jurisdictional defects which are apparent on the face of the record, * * * and in plain contravention of a statutory mandate" (Pet. App. 5a). *Leedom* was inapplicable, the court explained, because the FTC's alleged lack of jurisdiction was not apparent on the face of the record (*ibid.*).

ARGUMENT

The petition in this case presents nothing more than the kind of demand for premature judicial review of agency proceedings this Court has uniformly rejected. The decision of the court of appeals is correct, and is consistent with prior

⁴Despite its concession in *Dairymen II* that "[o]n the face of the FTC Improvements Act of 1980, the Commission has the authority to prosecute a Capper-Volstead cooperative" (C.A. App. 333), on appeal petitioner asserted for the first time (Brief for Appellant 16-21) that the Commission has no authority whatsoever over agricultural cooperatives.

decisions of this Court. Petitioner cites no conflict with a decision of any other court, and offers no other reason for plenary consideration.

1. This case concerns the timing of judicial review of petitioner's claim that its acquisition of Farmbest is exempted from antitrust proceedings by the FTC under the Capper-Volstead Act, 7 U.S.C. 291-292. The Capper-Volstead Act exempts from the antitrust laws combinations of persons "engaged in the production of agricultural products as farmers * * * [and] dairymen * * * in collectively processing, preparing for market, handling and marketing * * * such products of persons so engaged" (7 U.S.C. 291). Petitioner concedes (Pet. 8) that the subject of the challenged acquisition, Farmbest, is a processor, not a producer of agricultural products. Farmbest therefore could not become a member of Dairymen, Inc. *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967). This Court has ruled that only activities legitimately related to bona fide collaborative processing and marketing efforts by genuine producers fall within the exemption. See, e.g., *United States v. Borden Co.*, 308 U.S. 188, 204-205 (1939) (agreement with distributors and others not exempt from Sherman Act); *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 462-467, 468-469 (1960) (acquisition of milk dealer not exempt from Section 7 of the Clayton Act).⁵ See also *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981) (proof of predatory conduct not necessary to overcome Capper-Volstead exemption). Moreover, the right to an exemption is not automatic;

⁵ A leading commentator has read this Court's decisions in *Maryland & Virginia Milk Producers Ass'n*, *supra*, 362 U.S. at 464-466, and in *Borden Co.*, *supra*, 308 U.S. at 203-205, to hold that the exemption does not apply to combinations of Capper-Volstead associations with non-exempt organizations, whether by merger or by agreement. P. Areeda, *Antitrust Analysis* 109 (3d ed. 1981).

the burden of proving entitlement rests upon the party claiming it. *United States v. First City National Bank*, 386 U.S. 361, 366 (1967); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).

2. The decision of the court of appeals postponing review of petitioner's claim to a Capper-Volstead exemption until final agency action accords fully with the guidelines established in the Administrative Procedure Act ("APA"), for review of agency action (5 U.S.C. 701 *et seq.*), as recently reiterated in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal*"). The Commission's averment of jurisdiction over the transaction and petitioner's denial put in issue matters of law, and possibly of fact, to be explored by the Commission in the first instance on the adjudicatory record. After the Commission makes its final determination judicial review of all adverse determinations is provided. Such review does not lie in the district courts, however, but in the courts of appeals in accordance with the statutory scheme established by Congress for review of FTC orders under the Clayton and Federal Trade Commission Acts. 15 U.S.C. 21(c) and 45(c). See *Socal, supra*, 449 U.S. at 245.

In the present posture of the administrative proceeding from which petitioner claims exemption, the ALJ has denied petitioner's claim (C.A. App. 219-226) and declined to certify the issue to the Commission for interlocutory review (C.A. App. 319). Thus the claim of exemption must await review and final disposition by the Commission of the ALJ's Initial Decision, in accordance with 5 U.S.C. 557(b) and the Commission's rules, 16 C.F.R. 3.51-3.54,⁶ before it constitutes final agency action ripe for judicial review in the courts of appeals. This procedure is precisely what *Socal* contemplated.

⁶Under the rules, any party may appeal from adverse rulings. 16 C.F.R. 3.52. Alternatively, the Commission may review the initial decision *sua sponte*. 16 C.F.R. 3.53.

In *Socal* a firm charged with violations of the Federal Trade Commission Act sought district court review of the lawfulness of an FTC administrative proceeding against it while the administrative adjudication was pending before an ALJ. *Socal* claimed that the Commission had violated the Federal Trade Commission Act by issuing its complaint without having "reason to believe" that *Socal* was violating the Act. This Court held that the Commission's decision to initiate an administrative adjudicative proceeding, by a complaint averring "reason to believe" that certain firms were engaged in unfair methods of competition, was not "final agency action" subject to judicial review under Section 10(c) of the APA (5 U.S.C. 704). 449 U.S. at 238-245.

The principles of *Socal* apply a fortiori to contested claims of exemption from administrative inquiry that require initial disposition of issues of law and fact. Petitioner can point to no irreparable injury entitling it to extraordinary intervention by the district court. In the present posture of the administrative proceedings it is not required to do or refrain from doing anything. Its possession of Farmbest continues undisturbed. It must, of course, respond to the administrative complaint. But the burden incurred in defending the acquisition against the Commission's allegations is not irreparable harm justifying a district court injunction. *Socal, supra*, 449 U.S. at 244.⁷

⁷ *Socal* also demonstrates why *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), does not support petitioner's claim. *Abbott Laboratories* involved effective regulations, not a nonfinal adjudicatory proceeding. The regulations were " 'definitive' " statements of the agency's position; they had a " 'direct and immediate * * * effect on the day-to-day business' " of the parties; they had the " 'status of law' "; and " 'immediate compliance with their terms was expected.' " *Socal, supra*, 449 U.S. at 239-240, quoting *Abbott Laboratories, supra*, 387 U.S. at 151-152.

In *Sunkist Growers, Inc. v. FTC*, 464 F. Supp. 302 (C.D. Cal. 1979), appeal dismissed, No. 79-3091 (9th Cir. Sept. 14, 1981), a district court

3. Petitioner claims, nevertheless, that Section 20(a) of the Federal Trade Commission Improvements Act of 1980 (Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. V) 57c note) was intended to free it from any inquiry by the Commission into its claim of exemption. On its face, however, Section 20(a) is simply a reaffirmation of the Capper-Volstead exemption, expressed as a restriction on the use of appropriated funds by the FTC. It provides only that the Commission may not use funds to conduct "any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of [the Capper-Volstead Act], is not a violation of any Federal antitrust act or the Federal Trade Commission Act * * *." Although the question of Commission authority relating to agricultural cooperatives was vigorously debated, the terms in which the 96th Congress expressed its will in Section 20(a) preserved the Commission's jurisdiction over anticompetitive transactions not otherwise exempted by the Capper-Volstead Act. The Conference Report on the Federal Trade Commission Improvements Act of 1980 explains (H.R. Rep. No. 96-917, 96th Cong., 2d Sess. 37 (1980) (emphasis added)):

This section has been added to ratify the spirit and intent of the Capper-Volstead Act (7 U.S.C. 291-292).

The Conferees believe that the rationale for the *limited* antitrust exemption contained in the statute is valid.

Individual members of Congress likewise recognized that under Section 20(a) the Commission retained its existing jurisdiction over agricultural cooperatives.*

held that a claim to exemption from FTC proceedings by a growers' association was ripe for immediate review, but that the transactions involved, including a challenged acquisition, were subject to Commission jurisdiction. The court's holding on the timing of judicial review was subsequently overruled by *Socal*.

*See 126 Cong. Rec. H3859-H3860 (daily ed. May 20, 1980) (remarks of Rep. Broyhill); *id.* at H3870 (remarks of Rep. Goldwater); 126 Cong. Rec. S5682 (daily ed. May 21, 1980) (remarks of Sen. Danforth).

In sum, nothing in the plain language or the legislative history of Section 20(a) indicates that Congress intended to abandon the principles of finality and orderly judicial review expressed in *Socal*, and to transfer from the Commission to the district courts for immediate resolution the question of Capper-Volstead exemption from the Commission's jurisdiction.

Since Section 20(a) was not intended to bar the Commission from determining whether the Capper-Volstead exemption applies, there is no merit to petitioner's claim that merely subjecting it to a proceeding in which this question will be resolved violates its rights. Therefore, its claims that immediate district court review is necessary to prevent loss of its Section 20(a) rights are without foundation. The Capper-Volstead issue must await final resolution by the Commission and review of any adverse order in the court of appeals. At the present stage of the case, the ALJ's ruling on the merits of the Capper-Volstead issue is preliminary and interlocutory. As the Court explained, in rejecting a similar contention in *Socal*, *supra*, 449 U.S. at 245, the APA expressly provides that a " 'preliminary, procedural, or intermediate agency action or ruling not directly reviewable' is subject to review on the review of the final agency action," 5 U.S.C. § 704 * * * ." The APA also provides that the "reviewing court shall * * * hold unlawful and set aside agency action * * * in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" (5

In support of its claim that Congress specifically intended to protect cooperatives from expenses they might incur in defending themselves in FTC proceedings, petitioner erroneously relies (Pet. 12-15) on various excerpts from debates in the House on Representative Andrews' proposed amendment to H.R. 2313, 96 Cong., 1st Sess. (1979), which would have barred *all* Commission antitrust activities against agricultural cooperatives. However, Representative Andrews' amendment was rejected in conference. See H.R. Rep. No. 96-917, *supra*, at 21-22, 36-37.

U.S.C. 706(2)(C)). Moreover, Congress has expressly invested the courts of appeals with exclusive jurisdiction over the "form of proceeding for judicial review" of final Commission orders — petitions for review. 15 U.S.C. 21(c), 45(c).⁹

Such proceedings are plainly adequate to dispose of petitioner's claim that its acquisition of Farmbest is exempt from scrutiny by the Commission. As *Socal* noted (449 U.S. at 242), interlocutory judicial review of such claims by a district court would disrupt ongoing agency processes, deprive the judiciary of the benefit of agency expertise, lead to piecemeal review, and delay resolution of the ultimate question whether the law had been violated.¹⁰

4. Petitioner is mistaken in relying on *Leedom v. Kyne*, 358 U.S. 184 (1958), to support its claim (Pet. 18-19) that this case is distinguishable from *Socal*. In *Leedom*, the NLRB had violated a specific and unambiguous legislative prohibition against combining professional and nonprofessional employees in the same bargaining unit without approval by a majority vote of the professional employees (358 U.S. at 188). The unlawful nature of the Board's action was conceded by the agency (*id.* at 187). Moreover, without immediate access to judicial review by the professional employees the right Congress had expressly conferred on them would have been obliterated, for there was no other means, within their control, by which they could protect their statutory right to bargain collectively as a separate

⁹Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 703, provides that except in the absence or inadequacy thereof, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute * * *."

¹⁰Congress provided in 5 U.S.C. (Supp. V) 559 that no subsequent statute may be held to supersede or modify the Administrative Procedure Act and its provisions for judicial review "except to the extent that it does so expressly."

unit (*id* at 190). The issue in *Leedom* was thus whether judicial review should be entirely precluded. In contrast, the issue here "is just the timing and adequacy of judicial review by the prescribed method * * *." *General Finance Corp. v. FTC*, 700 F.2d 366, 370 (7th Cir. 1983). As we have shown above, review in the court of appeals following final Commission action is both timely and adequate under the scheme of the Federal Trade Commission and Clayton Acts.

5. Neither *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), nor *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), supports petitioner's claim (Pet. 17-18) that the Capper-Volstead issue is appropriate for review at this preliminary stage of the administrative proceedings. Here, in contrast to *Cohen*, the exemption issue would be merged into any adverse final order, and would be open to review by any appropriate court of appeals under 15 U.S.C. 21(c) and 45(c). See *Socal, supra*, 449 U.S. at 245-246. And unlike *Forgay*, where the lower court had ordered the disputed property sold and the proceeds distributed among creditors of the bankrupt, the Commission's assertion of authority has no immediate practical or legal effect on petitioner beyond its participation in the proceedings.¹¹ See *Socal, supra*, 449 U.S. at 239-242.

¹¹By order dated Nov. 4, 1982, the Commission withdrew the administrative proceeding from adjudication to permit its consideration of a proposed settlement. If the proposed settlement is rejected by the Commission, the case will be returned to adjudication for further proceedings. If accepted, it will be placed on the public record for a 60-day public comment period. Thereafter, the Commission may either withdraw its acceptance, or issue and serve the agreed final decision and order. 16 C.F.R. 3.25(f). Petitioner asserts (Pet. 11 n.4) that if the settlement is accepted, it will move to vacate the judgment of the court of appeals.

The approach this Court has followed in cases which have become moot subsequent to the judgment of the court of appeals has been to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

JOHN H. CARLEY

General Counsel

HOWARD E. SHAPIRO

Deputy General Counsel

ERNEST J. ISENSTADT

Assistant General Counsel

LESLIE RICE MELMAN

JOANNE L. LEVINE

Attorneys

Federal Trade Commission

MAY 1983

deny the petition if the issues presented do not independently merit review. *Velsicol Chemical Corp., v. United States*, 435 U.S. 942 (1978); cf. *Ringsby Truck Lines, Inc. v. Western Conf. of Teamsters*, 686 F.2d 720 (9th Cir. 1982) (judgment below should not be automatically vacated if appeal was mooted by appellant's voluntary action in settling a case). We perceive no legal consequences adverse to petitioner that could attach to the judgment of the district court if certiorari is denied. That judgment simply denied interlocutory review without passing on the merits either of the Capper-Volstead or the antitrust issue.